



Legal Update

May 2018

The SJC declares that the absolute prohibition of possessing stun guns in Massachusetts, under G.L. c. 140, § 131J, is unconstitutional and violates the Second Amendment.

Commonwealth v. Jorge Ramirez v. 479 Mass. 331 (2018): On November 5, 2015, at approximately 2:15 A.M., Officer Sean Matthews of the Revere police department stopped a vehicle after he observed that it had a broken taillight and was driving in a suspicious manner. There were three men inside the vehicle which included the defendant in the rear passenger seat. Officer Matthews observed the man making unusual movements inside the vehicle after he stopped it and he called for backup. Police ordered the men out of the vehicle and they conducted a pat-frisk of the defendant. Police found a stun gun in the defendant's pant pocket. Officer Matthews seized the weapon and placed the defendant under arrest for possession of a stun gun. During a subsequent search of the vehicle, the police recovered a firearm and a loaded extended grip magazine in the back seat, near where the defendant had been seated.

The defendant was charged in a criminal complaint with possession of a stun gun, in

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violation of G.L. c. 140, § 131J, as well as with carrying a firearm without a license, in violation of G. L. c. 269, § 10(a); carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10(n); and possession of a firearm without a firearm identification card, in violation of G. L. c. 269, § 10(h).

The defendant filed a motion to dismiss, citing *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*Caetano II*). The trial court denied the motion and the defendant petitioned for relief from the Single Justice of the SJC. The full SJC heard this case on appeal, acknowledging that the Supreme Court in *Caetano II* had not considered the question of whether G.L. c. 140, § 131J, was constitutional.

Conclusion: The SJC held the absolute prohibition against civilian possession of stun guns pursuant to G.L. c. 140, § 131J, violates the Second Amendment and therefore the complaint against the defendant must be dismissed. **The SJC also determined that the possession of stun guns may be regulated, but not absolutely banned.**

1st Issue: Are stun guns protected by the Second Amendment?

Pursuant to § 131J, a stun gun is defined as "a portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill. However, a stun gun is not a firearm because it does not discharge a shot or bullet. In considering the purpose of the Second Amendment, as well as its decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008), the Supreme Court found that "the District of Columbia's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." Additionally, one of the other issues was the fact that Second Amendment only applies to firearms that were "in existence in the 18th century. The Supreme Court found that *Heller* extends Second Amendment protections to all bearable arms, even those that were not in existence at the time of the founding." *Heller, supra* at 582. It also noted that "the term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity." *Id.* at 581. The Court, however, made clear that "the right secured by the Second Amendment is not unlimited," and "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626

The Supreme Court further held that some limitations on firearms are reasonable. Specifically, prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government

buildings, or laws imposing conditions and qualifications on the commercial sale of arms,"

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are necessary. *Id.* at 626.

However, while a stun gun would qualify as unusual because it was not "in common use at the time" the Second Amendment was enacted, it still does not preclude stun guns from the protection of the Second Amendment.

2nd Issue: Should §131J be struck down in its entirety?

The SJC analyzed whether the ban on stun guns was completely unconstitutional under the Second Amendment. As part of analysis, is examined how stun guns are similar to handguns with respect to that they are weapons that can injure or kill and, in the wrong hands, and can be used for many unlawful or reckless purposes. Even though stun guns are less lethal than a handgun, stun guns can be used to conceal the torture and abuse of another person because they "can deliver repeated or prolonged shocks without leaving marks." See Turner & Jumbelic, Stun Gun Injuries in the Abuse and Death of a Seven-Month-Old Infant, 48 J. Forensic Sci. 1 (2003). The SJC noted that Massachusetts has not barred all civilian possession of firearms; instead, it has prohibited certain classes of persons from possessing firearms by promulgating licensing requirements. Because presumptively lawful prohibitions **do not burden conduct protected by the Second Amendment**, they fall outside the scope of the Second Amendment and are not subject to heightened scrutiny. See *Chief of Police of Worcester v. Holden*, 470 Mass. 845, 853 (2015). See also *Commonwealth v. McGowan*, 464 Mass. 232, 240-241 (2013) (we have "consistently held, without applying any level of heightened scrutiny, that the decisions in *Heller* and *McDonald* [v. Chicago, 561 U.S. 742 (2010),] did not invalidate laws that require a person to have a[n] [FID] card to possess a firearm in one's home or place of business"). Based on this analysis, the SJC held that § 131J cannot be saved through partial invalidation and must declare it to be facially invalid in its entirety.

"Because this will invalidate the Legislature's absolute ban and leave no lesser restriction on the possession of stun guns in its place, and because the SJC recognizes that the Legislature may wish to do what it cannot (revise the statute in a manner that will preserve its constitutionality), the SJC will stay the **judgment shall be stayed for sixty days after the date of the issuance of the rescript in this case** in order to allow the Legislature adequate time to amend the statute in light of this opinion, if it so chooses."

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